

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

XAVIER TERRY,  
Plaintiff,  
v.  
N.P. DOEHRING, et al.,  
Defendants.

Case No. [18-cv-02946-PJH](#)

**ORDER OF DISMISSAL WITH LEAVE  
TO AMEND**

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

**DISCUSSION**

**STANDARD OF REVIEW**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed

1 factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]  
2 to relief' requires more than labels and conclusions, and a formulaic recitation of the  
3 elements of a cause of action will not do. . . . Factual allegations must be enough to  
4 raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550  
5 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer "enough facts to state  
6 a claim to relief that is plausible on its face." *Id.* at 570. The United States Supreme  
7 Court has recently explained the "plausible on its face" standard of *Twombly*: "While legal  
8 conclusions can provide the framework of a complaint, they must be supported by factual  
9 allegations. When there are well-pleaded factual allegations, a court should assume their  
10 veracity and then determine whether they plausibly give rise to an entitlement to relief."  
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
13 elements: (1) that a right secured by the Constitution or laws of the United States was  
14 violated, and (2) that the alleged deprivation was committed by a person acting under the  
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

## 16 **LEGAL CLAIMS**

17 Plaintiff states that he has received inadequate medical care.

18 Deliberate indifference to serious medical needs violates the Eighth Amendment's  
19 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104  
20 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*  
21 *grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en  
22 banc). A determination of "deliberate indifference" involves an examination of two  
23 elements: the seriousness of the prisoner's medical need and the nature of the  
24 defendant's response to that need. *Id.* at 1059.

25 A "serious" medical need exists if the failure to treat a prisoner's condition could  
26 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.*  
27 The existence of an injury that a reasonable doctor or patient would find important and  
28 worthy of comment or treatment; the presence of a medical condition that significantly

1 affects an individual's daily activities; or the existence of chronic and substantial pain are  
2 examples of indications that a prisoner has a "serious" need for medical treatment. *Id.* at  
3 1059-60.

4 A prison official is deliberately indifferent if he or she knows that a prisoner faces a  
5 substantial risk of serious harm and disregards that risk by failing to take reasonable  
6 steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must  
7 not only "be aware of facts from which the inference could be drawn that a substantial  
8 risk of serious harm exists," but he "must also draw the inference." *Id.* If a prison official  
9 should have been aware of the risk, but was not, then the official has not violated the  
10 Eighth Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290  
11 F.3d 1175, 1188 (9th Cir. 2002). "A difference of opinion between a prisoner-patient and  
12 prison medical authorities regarding treatment does not give rise to a § 1983 claim."  
13 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

14 Plaintiff states that he has moderate degenerative arthritis of the hips and bilateral  
15 sacroiliac joint space narrowing. Plaintiff had been prescribed morphine sulfate for the  
16 pain but that was discontinued because he tested positive for methadone in 2016, which  
17 was not prescribed to him. Plaintiff is now prescribed nortriptyline, ibuprofen and aspirin,  
18 but he argues that these medications do not help the pain which had been previously  
19 noted by medical staff. Plaintiff argues that the positive test for methadone was a  
20 mistake and he seeks injunctive relief to be provided morphine again.

21 While plaintiff identifies two defendants in the caption of the complaint he does not  
22 discuss them in the body of the complaint. The complaint is dismissed with leave to  
23 amend to provide more information. Plaintiff must describe the specific actions of the  
24 individual defendants and how they violated his constitutional rights. Plaintiff must also  
25 provide more information how the substitution of other medication for morphine was  
26 deliberately indifferent to his serious medical needs. In this complaint, plaintiff only  
27 describes a difference of opinion between himself and the doctors and this fails to set  
28 forth an Eighth Amendment claim.

1 **CONCLUSION**

2 1. The complaint is **DISMISSED** with leave to amend in accordance with the  
3 standards set forth above. The amended complaint must be filed no later than **July 16,**  
4 **2018**, and must include the caption and civil case number used in this order and the  
5 words AMENDED COMPLAINT on the first page. Because an amended complaint  
6 completely replaces the original complaint, plaintiff must include in it all the claims he  
7 wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may  
8 not incorporate material from the original complaint by reference. Failure to file an  
9 amended complaint may result in dismissal of this case.

10 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
11 court informed of any change of address by filing a separate paper with the clerk headed  
12 "Notice of Change of Address," and must comply with the court's orders in a timely  
13 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute  
14 pursuant to Federal Rule of Civil Procedure 41(b).

15 **IT IS SO ORDERED.**

16 Dated: June 15, 2018

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PHYLLIS J. HAMILTON  
20 United States District Judge  
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1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 XAVIER TERRY,  
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6 v.  
7 N.P. DOEHRING, et al.,  
8 Defendants.

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**CERTIFICATE OF SERVICE**


9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.  
10 District Court, Northern District of California.

11  
12 That on June 15, 2018, I SERVED a true and correct copy(ies) of the attached, by placing  
13 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery  
15 receptacle located in the Clerk's office.

16  
17 Xavier Terry ID: J51039  
18 Salina Valley State Prison  
19 P.O. Box 1050  
20 Soledad, CA 93960

21 Dated: June 15, 2018

22  
23 Susan Y. Soong  
24 Clerk, United States District Court

25   
26 By: \_\_\_\_\_  
27 Kelly Collins, Deputy Clerk to the  
28 Honorable PHYLLIS J. HAMILTON